Petition

81-1355

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

NO. _____

WALTER W. MALONE, PETITIONER,

V.

COMMISSIONER JOHN F. RICHARDSON, ET AL

PETITION FOR A WRIT OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS,
SECOND JUDICIAL DISTRICT

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January 13, 1982

QUESTIONS PRESENTED

1. Is the Administrative Decision of the City of Geneva Board of Police and Fire Commissioners arbitrary and capricious and thus violative of the due process clause of the Fourteenth Amendment to the Constitution?

2. Are the Rules and Policies of the Geneva Police Department nebulous and enforced in an "ex post facto" manner so as to violate the due process clause of the Fourteenth Amendment to the Constitution?

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CITATIONS

Cases:

Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).

Muller v. Conlisk, 429 F.2d 901 (7th Cir.Ill. 1970).

Flynn v. Giarrusso, 321 F.Supp. 1295 (E.D.La. 1971).

Canty v. Board of Education, City of New York, 312 F.Supp. 254 (S.D.N.Y. 1970).

Covington v. Sielaff, 430 F.Supp. 562 (N.D.E.D.Ill. 1977).

Miscellaneous:

U. S. CONST. amend. XIV, § 1.

IN THE
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WALTER W. MALONE, PETITIONER,

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COMMISSIONER JOHN F. RICHARDSON, ET AL[1]

PETITION FOR A WRIT OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS,
SECOND JUDICIAL DISTRICT

The petitioner, Walter W. Malone, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, Second Judicial District, entered in this proceeding on the 27th

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[1]The complete listing of Respondents is as follows: Comm. John F. Richardson, Comm. James D. Keith, Comm. Robert G. Schick, Board of Fire and Police Commissioners of the City of Geneva, and Scott Brundige.

day of March, 1981. The Illinois Supreme Court denied leave to appeal by order entered on October 19, 1981.

OPINION BELOW

The judgment and opinion of the Appellate Court of Illinois, Second Judicial District ("Appellate Court") appears in the Appendix hereto. No opinion was rendered by the Illinois Supreme Court.

JURISDICTION

The judgment and opinion of the Appellate Court was entered March 27, 1981. The order of the Illinois Supreme Court denying leave to appeal was entered on October 19, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Is the Administrative Decision of the City of Geneva Board of Police and Fire Commissioners arbitrary and capricious and thus violative of the due process clause of the Fourteenth Amendment to the Constitution?

2. Are the Rules and Policies of the Geneva Police Department nebulous and enforced in an "ex post facto" manner so as to violate the due process clause of the Fourteenth Amendment to the Constitution?

STATUTORY PROVISIONS INVOLVED

Pertinent rules of the Geneva Police Department are set forth in the Appendix hereto.

The due process clause of the Fourteenth Amendment to the Constitution of the United States provides: "Nor shall any state deprive any person of life,

liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

In an administrative hearing, the City of Geneva Board of Police and Fire Commissioners, (the "Board") found that Sergeant Walter Malone was in neglect of duty in breach of department Rules 1.5.2.35, 1.5.2.36, 1.4.7.1 and 1.4.7.2.1 [Appendix (1)] and that cause existed for his suspension from duty for 5 days without pay. Petitioner thereafter filed a complaint under the Administrative Review Act (Ill.Rev.Stat. 1975, ch.110, par. 264, et seq.) to the Circuit Court of the Sixteenth Judicial District, Kane County, Illinois ("Circuit Court"). The Circuit Court reversed the Board's decision on its finding that the evidence of neglect was unsubstantial and manifestly contrary to the weight of the

evidence. The Appellate Court reversed the order of the Circuit Court and reinstated the order of the Board in full upon its finding that the facts of the case were sufficient cause to warrant the order of suspension. The Illinois Supreme Court refused to hear the action.

"Neglect of Duty" and "Failure to Supervise" charges were issued against petitioner, an 18 year veteran Sergeant, stemming from a sole "indiscretion", his failure to make radio or other contact with Tri-Community Dispatch System (Tri-Com) (a Police Department communications center) or his subordinate officers between the hours of 1:00 a.m. and 3:41 a.m. on February 8, 1978. Charges of failing to supervise his subordinates flowed from this same failure to make contact. On the basis of these facts, Petitioner was formally charged with

breach of 2 Departmental Rules: Neglect of Duty, Rule 1.5.2.35 and Rule 1.5.2.36, Knowledge of Laws, Rules and Regulations [Appendix (1)]. At the Administrative Hearing and Circuit Court, evidence established that during the hours in question, the portable "fire" radio in petitioner's car, operative earlier that day, was inoperative, that the volume in the ISPERN radio was low and the Tri-Com radio turned off. As indicated in the order of the Circuit Court all witnesses testified that the Rules and Regulations of the Geneva Police Department are modified from time to time but that such modifications are not reduced to writing. [Appendix (3) p.xxvii] Testimony indicated that "custom and usage," the term used in the testimony to describe "modification" even varied from officer to officer. [Appendix (3) p.xxvii]

Further, the Circuit Court found that due to the quiet nature of the night shift, it would not be uncommon for periods of silence to exist for time frames of 2 hours or more. [Appendix (3) p.xxviii] Finally, the Circuit Court noted that animosity existed between the police officer bringing the charges and petitioner. [Appendix (3) p.xxii-xxiii] Thus, the evidence established that the actions of petitioner on the night of February 8, 1978 were well within normal departmental practices.[2]

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[2]Petitioner was charged with violation of two Rules: 1.5.2.35 and 1.5.2.36. The Board found that he also violated Rules 1.4.7.1 and 1.4.7.2 although he was never formally charged with same. This finding was objected to by counsel for petitioner at all stages of the proceedings. The Board made no findings as to Rule 1.5.2.36 [Appendix (3) p.xxxiv], and on this basis the Circuit Court apparently dismissed same. The Appellate Court indicated that they did not consider Rule 1.5.2.56 (sic) [Appendix (4) p.xxxix] but at the same time reinstated the order of the Board in full [Appendix (4) p.liv] Thus, petitioner stands guilty of breach of four

HOW FEDERAL QUESTION IS PRESENTED

The constitutional issues identified in Questions Presented above and detailed in Reasons for Granting the Writ below, by their very nature, were raised continuously throughout the proceedings. The due process argument of petitioner was and is twofold: (1) the evidence was insufficient to support the charges against the petitioner;

Rules, two of which he was never formally charged with (Rules 1.4.7.1 and 1.4.7.2), one dismissed by both Circuit and Appellate Court for lack of evidence, and the fourth questioned in this Petition for writ of certiorari and at all previous stages. This is a separate and independent violation of due process.

and, (2) the Geneva Police Department's Rules and Regulations were vague and imprecise in nature and uneven and arbitrarily applied to petitioner. (See e.g. Report of Proceedings before Board of Fire and Police Commissioners 4/24/78 at pp.18, 65-68, 70; Circuit Court Report of Proceedings 2/22/80 at p.6 and 11/21/79 at p.12, and Argument of Plaintiff Walter W. Malone, "II. Order of the Board is Not Supported by the Evidence or Rules of the Department" all to the effect that finding of Board was unsupported by evidence and of the uneven application of the Rules; Appellate Court Brief and Argument of petitioner, at pp.10, and 19 arguing that Board's decision is against the manifest weight of the evidence and that ex post facto standards and procedures of the Board are unconstitutional.) That constitutional

issues were preserved is also evident in the opinions of both the Illinois Appellate Court [Appendix (4) pp.xliv, xlvi] and Circuit Court [Appendix (3) pp.xxvii, xxix-xxxvi]. Finally, the Petition for Leave to Appeal of petitioner to the Illinois Supreme Court further perpetuates these constitutional issues. (See petition for leave to appeal, Argument II on denial of due process to plaintiff, pp.13-16.)

REASONS FOR GRANTING THE WRIT

1. The Administrative Decision of the City of Geneva Board of Police and Fire Commissioners is arbitrary and capricious and thus violative of the due process clause of the Fourteenth Amendment.

The due process clause of the Fourteenth Amendment operates as a check on the fairness of an administrative

decision and will mandate overturning a decision which is arbitrary or capricious. Covington v. Sielaff, 430 F.Supp. 562 (N.D.E.D.Ill. 1977). An administrative decision is deemed "arbitrary or capricious" so as to violate due process when it is not supported by evidence or where there is no reasonable justification for the decision. Canty v.Board of Education, City of New York, 312 F.Supp. 254 (S.D. N.Y. 1970). Police departmental rules have been held to violate due process if overbroad. Muller v. Conlisk, 429 F.2d 901 (7th Cir.Ill. 1970); Flynn v. Giarrusso, 321 F.Supp. 1295 (E.D.La. 1971).

Petitioner, an 18 year veteran with an excellent record, was out of touch with his subordinates for 2 hours and 41 minutes. This is his sole indiscretion.

At the end of this time, it was discovered that one of his radios was inoperative. A reading of the Appellate Court decision would indicate that the neglect of duty deemed pertinent was Sergeant Malone's failure to test his equipment to determine whether it might be malfunctioning after a several hour period of silence. A mar on the record of a veteran policeman under the telling headline "neglect of duty" is based upon these facts. Due process will not allow this penalty to stand unless there is reasonable justification for the decision of the Board supported by evidence. After a thorough review of the evidence the Circuit Court found the Board's decision "manifestly contrary to the weight of the evidence." [Appendix (3) pp.xxix-xxx] Indeed, the Circuit Court was doubtful that <u>any</u> neglect existed,

and if so, found it to be insubstantial. [Appendix (3) pp.xxix] While the Appellate Court seems to give the Board total flexibility in establishing a de minimus standard for the evidence presented it is submitted that the facts of this case cannot meet due process standards.

The Appellate Court cannot abdicate its responsibility to assess the evidence in light of constitutional mandates in favor of total acceptance of the decisions of the administrative body. This is especially true when the trier of fact has reviewed all of the evidence and found it woefully lacking. Having failed to meet the minimum requirements of due process the Appellate Court decision reinstating the decision of the Board must be reversed.

2. The Rules and Policies of the Geneva Police Department in question are nebulous and enforced in an "ex post facto" manner so as to violate the due process clause of the Fourteenth Amendment to the Constitution.

It is clear that after a thorough review of the evidence, the trial court found this argument of petitioner's dispositive. The court expressed concern at charging petitioner with contravening standards uncertain and nebulous on their face, [Appendix (3) p.xxxii], further obscured by modifications unknown in number, scope and effect and unevenly applied to personnel, stating:

> "It is not a matter of fairness nor justice to charge offenses against rules which are best honored in breach or as testified by all subject to modification and change by custom and usage."
> [Appendix (3) p.xxix]

The Appellate Court summarily and erroneously chose to disregard all of this testimony on the basis of relevance. [Appendix (4) p.xlii] It also considered evidence of uneven enforcement of standards as within the discretion of the Board. Clearly this is an erroneous reading of the facts as juxtaposed with the dictates of our Constitution.

The Geneva Police Department regulations and rules did not contain any written rule directing a sergeant to conduct frequent physical radio and/or visual contacts of his subordinates, nor did it require a sergeant or any police officer to conduct frequent tests of radio equipment nor frequent or habitual radio checks with Tri-Com. On the contrary, testimony produced at the hearing showed a laxity of procedures which allowed sergeants to switch their hours,

and which also allowed police officers to patrol with over an hour and a half of time without checking in to Tri-Com or communicating with other police officers on patrol at the same time. Sergeant Malone merely conformed to these established procedures, but in no way did he engage in any misconduct or neglect of duty that could substantiate cause for suspension and loss of pay.

This is precisely the type of administrative action that falls within the scope of the "arbitrary" and "capricious" prohibition of due process. A previously unblemished 18 year record, and advantages attendant thereto, is marred on the basis of a violation of standards of which petitioner was not and could not be fully cognizant. Such a penalty cannot stand within the protection afforded the due process clause of the

Fourteenth Amendment. As stated by this court in Garrity v. New Jersey, 385 U.S. 493, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967):

> "Policemen like teachers and lawyers are not relegated to a watered-down version of constitutional rights."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Illinois Appellate Court, Second District.

Respectfully submitted,

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January 13, 1982

APPENDIX

(1) RULES OF THE GENEVA POLICE DEPARTMENT

1.5.2.35 Neglect of Duty

Neglect of duty. To this end, there shall be no failure to give suitable attention to the performance of duty. Examples include, but are not necessarily limited to: failure to take appropriate action on the occasion of a criminal offense, disorder or other act or condition deserving police attention; absence without leave, failure to report to duty at the time and place designated; unnecessary absence from one's assignment during a tour of duty; failure to perform duties or comply with any rule or regulation, general or specific order; or failure to conform to Department operating policies and/or procedures.

1.5.2.36 Prompt Performance of Duty

Failure to promptly perform as directed

all lawful duties required by constituted authority, notwithstanding the general assignment of duties and responsibilities.

1.4.7 Duties of Sergeants

1.4.7.1 General

Subject to direction from the Chief of Police and/or Assistant Chief who by the attached organizational chart of the Department is the superior of the Sergeant, a Sergeant has direct control of all subordinate members and employees of the Department. In addition to general and individual responsibilities of a member and employee of the Department, a Sergeant is responsible for the following:

1. Command - The direction and control of individuals under his command to assure the proper performance of duties and adherence to established

rules and regulations, policies and procedures of the Department.

2. Loyalty and Espirit de Corps - Its development and maintenance.
3. Discipline and Morale - Its development and maintenance.
4. Intradepartment Action - The promotion of harmony and cooperation with other units of the Department and initiation of proper action in cases not regularly assigned to the command when delay necessary to inform the proper unit might result in a failure to perform a police duty.
5. Organization and Assignment - Of duties to assure prompt performance of department functions and those of the command. To this end, Sergeants shall immediately familiarize themselves with all police business

transacted since their last tour of duty.

6. Reports and Records - Preparation of required correspondence, reports and maintenance of records relating to the activities of the command. Assurance that information is communicated up and down the chain of command is required. To this end, Sergeants at the conclusion of their tour of duty shall submit reports in writing as to the activity of the members (employees of the Department under their command) as well as all pertinent information necessary for the functioning of the Chief of Police and/or the Assistant Chief who by the organizational chart of the Department is the superior of the Sergeant.

7. Maintenance - Assurance that facilities, equipment, supplies and material assigned to the command are correctly used and maintained.

1.4.7.2 Specific

1. Supervision - Closely supervising the activities of subordinates, making corrections where necessary and commending where appropriate.

(2)
STATE OF ILLINOIS)
COUNTY OF KANE)
CITY OF GENEVA)

BEFORE THE BOARD OF FIRE
AND POLICE COMMISSIONERS
OF THE CITY OF GENEVA,
KANE COUNTY, ILLINOIS

IN THE MATTER OF CHARGES)
AGAINST WALTER W. MALONE,) CHARGES FILED
SERGEANT OF THE GENEVA) MARCH 7, 1978
POLICE DEPARTMENT, CITY)
OF GENEVA, KANE COUNTY,)
ILLINOIS.)

FINDINGS, DECISION AND ORDER OF THE BOARD

This cause coming on to be heard on charges filed with the Board of Fire and Police Commissioners by Chief of Police Scott Brundige against the Respondent Walter W. Malone, Sergeant, Geneva Police Department.

The charges filed against the Respondent, Walter W. Malone, are as follows:

> Violation of the following Rules and Regulations of the Police Department in full force and effect on the date of the

alleged violation, viz:

Section 1.5.2.35 Neglect of Duty

Section 1.5.2.56 Knowledge of Laws, Rules and Regulations, Policies and Procedures and General and Special Orders

This Board of Fire and Police Commissioners of the City of Geneva, Illinois, as a result of its hearing on the charges, finds and determines that:

(1) The Respondent, Walter W. Malone, was, at all times mentioned herein, a Sergeant of the Police Department of the City of Geneva, Kane County, Illinois.

(2) The charges filed were in writing, and a notice, stating the time and place where the hearing was to be held, together with a copy of the Charges, was duly served upon the Respondent as required by statute.

(3) That this Board of Fire and

Police Commissioners has jurisdiction of the subject matter of said charges and the person of said Respondent.

(4) The hearing on the charges was held before the undersigned members of the Board of Fire and Police Commissioners on March 22, 1978, April 22, 1978, April 24, 1978, and April 30, 1978.

(5) Throughout the hearing the Respondent appeared in person and was represented by counsel of his own selection. Likewise, Complainant appeared in person and was represented by counsel of his own selection. All witnesses were sworn, testified under oath, and were subject to cross-examination.

(6) Respondent as charged herein, and contrary to the Rules and Regulations of the Police Department, including the Rules and Regulations cited in the

Charges, was upon February 8, 1978, guilty of violation of Rules and Regulations 1.5.2.35 entitled, "Neglect of Duty", and 1.5.2.56 entitled, "Knowledge of Laws, Rules and Regulations, Policies and Procedures, and General and Special Orders", in that:

(a) Repondent (sic) Malone was in neglect of duty in that he had no visual, physical or radio contact with his subordinate police patrolmen, Jeffrey Lindskoog and Steven Smith, between the hours of 1:00 a.m. and 3:41 a.m. on February 8, 1978, all such times being during Respondent's tour of duty as sergeant and senior police officer on duty within the City of Geneva.

(b) Respondent Malone was in neglect of duty in that he had no visual, physical or radio contact

with Kathy Rerko (Police Department receptionist), or any Tri-Com (a tri-city police, fire and ambulance communication system) personnel between the hours of 1:00 a.m. and 3:41 a.m. on February 8, 1978, all such times being during Respondent's tour of duty as sergeant and senior police officer on duty within the City of Geneva.

(c) Respondent Malone was in neglect of duty and breached Police Department procedures in that he failed to place or adjust the audio volume of the ISPERN (Illinois State Police Emergency Radio Network) radio at a level sufficient to receive transmission to be heard by him all from the hours of 1:00 a.m. to 3:41 a.m. on February 8, 1978. It was the customary and standard

operating procedure of the Police Department to maintain the volume of the ISPERN radio at a level to hear all ISPERN radio transmissions.

(d) Respondent Malone was in neglect of duty and breached Police Department procedures in that he did not obtain a recharged portable radio from the Police Department upon or shortly after reporting for duty at 1:00 a.m., February 8, 1978, contrary to customary practice. Instead, Respondent continued to rely upon a portable radio which had been in use ten hours prior to Respondent's tour of duty and failed to test the proper functioning of his communication equipment.

(e) Respondent Malone was in neglect of duty in that he did not attempt, or cause to take any

action, to closely supervise the activities of his subordinate patrol officers, nor to inspect the activities of his subordinate patrol officers or the office operation at the Police Department, all from the hours of 1:00 a.m. to 3:41 a.m. on February 8, 1978.

(f) Respondent Malone was in neglect of duty in that he did not respond to Patrolman Lindskoog's portable radio request for his assistance at 2:22 a.m. on February 8, 1978; Respondent did not respond to Tri-Com's request for him to contact Tri-Com Center at 3:15 a.m., 3:16 a.m., 3:40:38 a.m. and 3:40:57 a.m. on said date; and Respondent did not respond to Patrolman Lindskoog's request via ISPERN to contact Lindskoog at 3:22 a.m. on

said date.

(g) Respondent Malone was in neglect of duty in that he did not test, or attempt to test, the portable Tri-Com radio attached to his person during the hours of 1:00 a.m. and 3:41 a.m. on February 8, 1978.

(h) Respondent Malone was in neglect of duty in that he did not meet his duties as a sergeant, as defined by Sections 1.4.7.1 and 1.4.7.2 of the Rules and Regulations of the Geneva Police Department to-wit:

(1) Failed to direct and control patrol officers under his command to assure the proper performance of duties;

(2) failed to closely supervise the activities of subordinates;

(3) failed to inspect activities of subordinate patrol officers and other Police Department personnel to insure that their safety was not impaired and that their performance was proper.

In short, Respondent took no affirmative action to contact or observe subordinate personnel under his command.

(i) This Board further finds that Respondent's Motion to Strike the Charges on the basis of a typographical error in the numeral citation to the Police Department rule pertaining to "Neglect of Duty" should be denied in that the error was de minimis and the Respondent was fully apprised of the nature of the charge against him and was

was knowledgeable of the Rules and Regulations of the Police Department.

By reason of the foregoing finding of facts and of the guilt therein, cause exists for Respondent to be suspended from duty, without pay, for a period of five (5) working days, commencing on the first working day following the issuance of this decision.

IT IS HEREBY ORDERED that by reason of sufficient cause having been determined, Respondent, Walter W. Malone, shall be and he is hereby suspended from duty without pay for a period of five (5) working days commencing on the first of said working days following the date of this Order.

IT IS FURTHER ORDERED that Respondent's Motion for Dismissal of said Charges on the grounds of sufficiency and

notice are accordingly denied.

DATED at the City of Geneva, Illinois, this 31st day of May, 1978.

John F. Richardson

James Keith

Robert G. Schick

being members of the Board of Fire and Police Commissioners of the City of Geneva, Kane County, Illinois.

(3)

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

WALTER W. MALONE, Plaintiff	)	
vs	)	No. 78 MR 6370
COMMISSIONER JOHN F. RICHARDSON, et al Defendants	)	

O R D E R

This case involves a suspension order of the police chief suspending the plaintiff for five days and forfeiting pay for refusal of plaintiff to obey an order to take a lie detector test. From this order an appeal was taken to the Board of Police and Fire Commissioners.

It further involves the hearing of charges by the police chief against the plaintiff for neglect of duty and failure to have knowledge of Rules and Regulations, Policies and Procedures,

General and Special Orders which were heard simultaneously with plaintiff's appeal from the suspension order.

Since the plaintiff prevailed before the Board on the chief's suspension order it was not necessary for plaintiff to appeal that finding to this court and the defendants filed no cross-appeal from such order, but the matters involved in the two charges are so intertwined as to be quite inseparable.

If the court may digress a moment, it is obvious before one gets too far along in studying the transcript that considerably more is involved than the charges themselves.

However, the charges in this case must be judged by the rules of law applicable to their consideration.

By statute and by case law the findings of an administrative agency are

deemed to be prima facia true and correct.

This court is not authorized to re-weigh evidence or to make independent determination of facts thus merely substituting its own opinion for the determination of the administrative agency, but rather it is its duty to ascertain if the findings and decision of the administrative agency are against the manifest weight of the evidence.

There is much in the record that has no business being there. While the rules of evidence need not be strictly adhered to in a hearing of this nature. Evidence clearly not reliable and not related may suggest an entire picture inconsistent with the ends of justice.

An example of such is the following: The plaintiff on his return to the station met the chief and both tested

plaintiff's walkie-talkie unit and found it did not receive. Nothing unusual was noticed about the unit by either and so plaintiff placed it with the Tri Com Supervisor with a repair order.

Lindskoog asked the assistant chief if he could take possession of it "and put it into safekeeping or submit it as a type of evidence, in case some sort of disciplinary actions come out of the . . ." The record is devoid of the assistant chief's response to the request or innuendo that the request suggested. Smith saw it later that night in the main office - no testimony in whose possession it then was. Both officers described it differently. Where it went after that, no one knows. The testimony next shows it in the chief's possession several weeks later and he testified it came from Shuett. Where Shuett received it or

where it came from or how many other persons handled it in the meantime is not disclosed.

Evidence then is admitted as to why it would not function at the time it was examined as if that proved something.

If property generally were handled in such a manner, it would never be received in evidence.

However, this court has made every effort to avoide (sic) consideration of the innuendoes which might have been drawn from various items of evidence and statements made in the record by the participants.

The facts of this case commence with the plaintiff's tour of duty on the 11 to 7 shift commencing 11:00 o'clock P.M., February 7, 1978. During this shift, there was a period of time of from approximately one o'clock A.M., February

8th, to approximately four o'clock A.M., that it is suggested the whereabouts of the plaintiff is unknown, and the charges are that he neglected his duty as supervising officer during that period of time.

A departmental investigation was made as to his whereabouts which according to the Chief of Police turned up no evidence that he was not on duty which conclusion the Chief later testified as his conclusion on February 15th, being one week later.

On February 17th the Chief appointed Shuett acting chief for the period of February 19th to February 26th. Either on February 19th, the first day the Chief was absent or on the next day, Shuett ordered plaintiff to take a lie detector test. The record is clear that there existed animosity between Shuett and

plaintiff.

Shuett is not described by title herein because altho often referred to as "Assistant Chief", there appears in the record a flat and undenied statement that his designation as such was improper because he was not properly appointed to such position.

Shuett subsequently resigned and retired and did not appear as a witness so the court does not know what, if any, other rank he may have held in the department.

The test was taken and although the result was never introduced in evidence there was much on the record discussion indicating that a letter from the polygraph operator indicated some inconclusiveness about it.

On Feberuary 21st, one day after the test, the plaintiff advised Shuett in

writing of his refusal to take a further test, a fact which was communicated to the Chief upon his return.

Thereafter on March 2nd, the Chief, although knowing of the refusal, requested another test and when plaintiff refused, a suspension order dated March 2nd was ordered and served and an appeal taken by plaintiff on March 3rd. The Board heard this appeal along with the charges thereafter brought.

After the appeal was taken the Chief filed the charges now involved on March 7th, and the Chief's new charges and the appeal were noticed for hearing commencing March 22nd.

On May 31, 1978, the Board upheld plaintiff's appeal from the suspension order of the Chief on March 2nd, and sustained the Chief's charges dated March 7th, and ordered a 5-day suspension.

Plaintiff is a sergeant of the Geneva Police Department with eighteen years of service. His file indicates some complimentary letters of his actions while on duty and no record of charges derogatory to his service.

Plaintiff went on duty at one o'clock A.M., February 8, 1977, supervising two 1-man squads manned by officers Lindskoog and Smith.

He was given a portable Tri Com unit which was operating and which had been in operation for the previous shift according to the testimony of the prior tour supervisor.

His vehicle was equipped with an ISPERN radio with volume low, a Tri Com radio turned off and another permanently mounted but inoperable unit.

Plaintiff testified his portable radio was receiving for some time after

he came on duty and that he did not hear calls for him at 2:22.09, 3:15.44, 3:16.01, 3:22.44, 3:40.38 and 3:40.57.

The plaintiff while on duty from one o'clock A.M. until 3:41.01 made no effort to contact either of the other two units or Tri Com during that period of time.

He was called by radio and failed to respond at 2:22.09, 3:15.44, 3:16.01, 3:22.44, 3:40.38, 3:40.57 and did respond to a 3:41.01 call so that he was not reached despite efforts for a period of one hour and 19 minutes.

When he responded, it was found his portable radio was not receiving but would transmit. He had turned on the permanent Tri Com unit and received the 3:41.01 call on it. The walkie-talkie repairman testified that for whatever reason there was a loss of contact with a very small wire and its contact point

causing it to lose ability to receive. What caused the loss of contact was not the subject of testimony.

Rules and Regulations of the Geneva Police Department are in evidence. All witnesses testified substantially that they are modified from time to time by various meetings held between the Chief and other members of the department, and there are no minutes kept of such meetings and such modifications are not reduced to writing and put in the book.

No evidence was offered as to which rules have been modified and which have not.

The testimony indicated that "custom and usage", the term used in the testimony to describe "modification" even varied from officer to officer.

Sergeants were permitted to alter the duty roster by trading work hours -

as also were other members of the department with their supervising officer's consent.

There was no regular reporting schedule for on-duty personnel to report to either supervisors or any central office. Officers did not necessarily report at the department headquarters before assuming tour of duty.

The testimony supports a finding that the night shift is often quiet and periods of silence often exist for various time frames even of two hours or more.

On the night in question during the time frame involved the only reported event was that Lindskoog chased a car toward Batavia and had the Batavia police stop it. He called for plaintiff at 2:22.09 and plaintiff did not respond but Smith answered the call. No other calls

other than those described elsewhere herein were made by any one of the three officers. No arrests of any kind were made and no stops other than the one hereinabove described were made according to the evidence.

Taking into consideration all of the testimony much of which is controverted and being mindful of the record of service of the plaintiff this court is of the opinion that there is not evidence of substance to support the charges; that evidence of neglect, if any exists, is not substantial.

It is not a matter of fairness nor justice to charge offenses against rules which are best honored in breach or as testified by all subject to modification and change by custom and usage.

To find neglect in the context of such a picture is manifestly contrary to

the weight of the evidence.

The background alluded to earlier in this order may very well have affected the entire proceeding so as to be effective in influencing the administrative agency's decision. If it did so, it should not have. Neither it, nor the evidence satisfies the standards required to support the decision. A layman may very well wonder about police practice of trading duty hours without supervisory approval; of silence or non reporting for substantial time frames, a practice substantiated by every witness from the department who testified with respect thereto; of no set report times by every officer in the field; of no report off duty when an officer leaves his car for personal relief.

And this court can well understand the possible frustration or concern of

the members of the Board while listening to the testimony which was elcited concerning the department's operation.

It is within the context of this that the plaintiff is charged with violating rules and thereby neglect of duty and not knowing what the rules are.

Photo copy of charges against plaintiff are attached hereto as well as photo copy of the Board's order.

Paragraphs 6 (a), 6(b) and 6(c) charge plaintiff with offenses not in any written rules but with variations of custom and usage, which as indicated earlier, the proof shows varies even from officer to officer.

To "neglect" is a violation of Rule 1.5.2.35 but the rule does not set forth a standard for "neglect".

The closest thing that is in the rules to guide as a standard is Rule

1.5.1 using the language "to be detrimental to the discipline and efficiency of the Department and the image of the City and which law and sound public opinion recognize as injurious to the ability of the Department and the City to protect and serve the community."

This is a nebulous standard at best, and one that may vary with each persons (sic) interpretation.

An uncertain and nebulous standard is supposed to support variable rules of custom and usage and a violation of either or both is to be charged to the record of the plaintiff.

While the Board may have a right to interpret its own rules, what is being attempted here is to place one round billiard ball on another round billiard ball and then place a weight at the top and expect it all to stand up straight.

There is no proof in the record of a need of plaintiff to check his instrument to see whether it was or was not at that moment functioning, and paragraph 6(g) is not sustainable.

Paragraph 6(d) charging failure to get a recharged unit should fail for the same reasons as 6(a), 6(b) and 6(c), and also, in addition, the proof is undeniable that the failure of his portable unit to operate was not loss of power due to battery use, but a mechanical failure of the unit according to proof offered by the Chief and his witnesses. This could have happened to any unit and did not result from use beyond the tour of duty of the previous supervisory officer.

Paragraph 6(e) and 6 (h) refers to the supervisory duties of an officer over his subordinates under Rules 1.4.7.1 and

1.4.7.2 which rules are obviously intended as general and long term provisions and not to be taken as a minute by minute or even hour by hour contact with each subordinate which action if done could be even taken as "spying on them", "looking over the shoulder", "unnecessary direction" or "undue supervision", unless otherwise justified by some specific rule requiring regular reporting which did not on the night in question exist. This charge likewise must fail.

The Board made no finding with respect to Rule 1.5.2.56 relating to knowledge of the Rules and Regulations. With the totality of evidence of the modification of the rules without notice and without recording such modifications in any form there (sic) failure to make any such finding was entirely justified.

For whatever reason, the plaintiff, the senior officer on the force with eighteen years of unchallenged conduct and service has been charged with neglect of duty for violation of rules admittedly modified from time to time without notice and without such modifications being recorded, either in the published rules or by written supplements, such neglects being charged over a time span of less than 3 hours, and relating to failure of communication when he was in possession of a walkie talkie which through no fault on his part was malfunctioning for some part of such time span.

While guilt or innocence is not determined by what otherwise happened during the time frame in question, it is observed that at no time during the time frame involved was there any event or occurrence which happened to in any way

affect the status of law enforcement in the community.

As a result of the findings of the court and the reasoning hereinabove set forth, IT IS ORDERED AS FOLLOWS:

The Board's Findings of Neglect and Order entered thereon be and the same are hereby reversed.

The Board having made no findings nor entered any orders on the charge of violating Rule 1.5.2.56, such portion of the charge is hereby dismissed.

The Board's order with respect to refusal to obey a superior's order not having been cross-appealed from by the defendants, is hereby affirmed.

ENTER: (MAR 10 1980), 1980.

(ERNEST W. AKEMANN)

Judge

(4) STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT
ELGIN, ILLINOIS 60120

MAR 27 1981

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

GEN. NO. 80-254

Walter W. Malone, appellee v. Comm. John F. Richardson, Comm. James D. Keith, et al, appellants,

The judgment of the Circuit Court of Kane County is reversed. (See attached order.)

LOREN J. STROTZ, Clerk

Peter K. Wilson, Jr.
Bernard K. Weiler

Wendell W. Clancy
Tyler G. Neptune, Jr.

NO. 80-254

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

WALTER W. MALONE, Plaintiff-Appellee, -vs- COMMISSIONER JOHN F. RICHARDSON, et al	APPEAL FROM THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT, KANE COUNTY, ILLINOIS GEN. NO. 78 MR 6370 HON. ERNEST W. AKEMANN, JUDGE PRESIDING

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Following an administrative proceeding to consider charges against plaintiff, Sergeant Walter Malone, the City of Geneva Board of Police and Fire Commissioners found that plaintiff was in neglect of duty in breach of department Rules 1.5.2.35, 1.4.7.1 and

1.4.7.2,[1] and that cause existed for his suspension from duty for five days without pay. On plaintiff's complaint for administrative review (Ill. Rev. Stat. 1979, ch. 110, par.274 et seq.), the circuit court reversed the Board's order on its determination that evidence of neglect was unsubstantial and manifestly contrary to the weight of the evidence. By this appeal the Board seeks to reinstate its order, arguing that the order is supported by the manifest weight of the evidence and that its findings reasonably related to the charges filed against the plaintiff. Alternatively, the Board contends it is entitled to a new trial for the failure of the trial

---

1. Although the written order finds plaintiff also violated Rule 1.5.2.56, the trial judge dismissed that portion of the order, and as none of the parties raise that issue before us, we do not consider it.

court to grant its motion for a change of venue.

Inasmuch as the parties are aware of the facts, charges and findings, we will reiterate them only as necessary for this order.

The order of suspension stemmed from Sergeant Malone's failure, as ranking senior officer for the midnight shift on February 8, 1978, to make any radio or other contact with Tri-Community Dispatch System (Tri-Com), his two subordinate officers and other police personnel upon coming on duty at 1 a.m. until 3:41 a.m., and his failure to respond to six attempts to contact him over Tri-Com and ISPERN radio between 2:22 a.m. and 3:41 a.m. Under section 11 of the Administrative Review Act (Ill. Rev. Stat. 1979, ch. 110, par. 274), the findings and conclusions of an administrative agency on

questions of fact are prima facie true and correct. A reviewing court may set aside such findings only if they are against the manifest weight of the evidence. (Keen v. Police Board of the City of Chicago (1979), 73 Ill. App. 3d 65, 70, 391 N.E.2d 190; Petraitis v. Board of Fire and Police Commissioners (1975), 31 Ill. App. 3d 864, 867, 335 N.E. 2d 126.) The trial court found that the Board's finding of neglect was contrary to the manifest weight of the evidence in the context that department rules which plaintiff was charged with violating were not followed by other officers and were subject to modification and change by custom and usage. To support the trial court's finding plaintiff relies on testimony that some officers don't check in with Tri-Com at the start of their shifts, don't see a

sergeant for periods of more than 90 minutes and turn ISPERN down or off. Since the Board's findings of neglect were not based on plaintiff's failure to check in with Tri-Com upon going on duty, we disregard testimony concerning that subject. The Board's interpretation of Rule 1.5.2.35, "Neglect of Duty", as prohibiting the conduct charged is presumed valid and will not be disturbed if it is reasonably based in law. (Taylor v. Police Board of City of Chicago (1978), 62 Ill. App. 3d 486, 378 N.E.2d 1160.) This deference is accorded because the Board has responsibility and expertise in matters relating to enforcement of standards concerning discipline in the department. (Taylor v. Board of Police and Fire Commissioners). We find no authority for plaintiff's argument that lax department practices bind the

Board's determination of what constitutes neglect of duty. Particularly, since its determination involved a sergeant, and therefore a position of leadership, we cannot say its interpretation has no basis in law. (Taylor v. Police Board of City of Chicago.) Plaintiff does not claim that all police personnel, or more particularly, all sergeants, engage in these practices. Further, although testimony by officers was that communication was not always necessary during a shift, this had little bearing on the situation confronting the Board in which a sergeant's inaction on the particular night in question rendered communication impossible. Far more relevant to the Board's determination was the testimony of other sergeants that it is common to test for radio malfunction following long radio silence and evidence that plaintiff

himself was in the habit of testing for malfunctions during radio inactivity. For the foregoing reasons, we believe the findings and conclusions of the Board are supported by the evidence, and are not against the manifest weight of the evidence.

Next, we consider whether the Board's findings related to conduct with which the plaintiff was not charged. In an administrative hearing charges need not be drawn with the same precision required in a judicial proceeding. (Suddarth v. Board of Police and Fire Commissioners (1964), 48 Ill. App. 2d 194, 198 N.E.2d 705.) The written charges must be sufficiently clear and specific to allow the preparation of a defense. (Kupkowski v. Board of Police and Fire Commissioners (1979), 71 Ill. App. 3d 316, 389 N.E.2d 219.) Plaintiff

claims the Board's finding Nos. 6(c), (d), (f) and (g) did not relate to the subject of the written charges. Plaintiff was charged with failure, on February 8, 1978, between 1 a.m. and 3:41 a.m., to notify Tri-Com and subodinate officers of his presence on duty, his whereabouts and activities, and to supervise or have contact with Tri-Com, subordinate officers and other police personnel, in violation of Rule 1.5.2.35 (Neglect of Duty). The Board's findings which plaintiff claims are not listed in the charges related to plaintiff's failure to turn ISPERN up loud enough to hear transmission; failure to obtain a different recharged radio at the outset of the shift, as is customary; failure to respond to subordinate Officer Lindskoog's request for assistance as to a possible burglary in progress and

failure to respond to Lindskoog's and Tri-Com's requests for response; and failure to test the portable radio for possible malfunction. These findings added nothing new, but made findings based upon the evidence detailing specific instances of failure to communicate and supervise, and specific actions contributing to plaintiff's inability to communicate with Tri-Com and supervise subordinates. From our review of the record plaintiff was well aware of what the general allegations against him were, and the more specific findings were not matters with which he was not notified or were unsupported by the evidence. We do not agree with plaintiff that, in the absence of specific regulations concerning the foregoing, the findings established "ex post facto" standards relating to the manner of supervision

and the frequency of contact with subordinates. Plaintiff was at all times under a general duty to be attentive to his duties (Rule 1.5.2.35 "Neglect of Duty") and to closely supervise, direct, inspect and assist subordinates (Rule 1.4.7.2-6 "Specific"). Frequency of contact and manner of supervision which are necessary to accomplish these duties are inherent standards in these two regulations.

Finally, in their briefs the parties have argued the issue of whether cause existed for the suspension. Although the trial court did not expressly rule on the issue of whether there was sufficient cause for the imposition of a five day suspension, his general findings that the evidence did not support findings of misconduct are sufficient, in this instance, to raise this matter on appeal. Unlike

administrative findings of fact its determination that the violation constitutes cause is not prima facie true and correct. (Christenson v. Board of Police and Fire Commissioners (1980), 83 Ill. App. 3d 472, 404 N.E.2d 339.) In suspension of an officer, the Board has broad discretion, but it is essential to the validity of such suspension that it be based upon substantial misconduct or incapacity, and not upon misconduct so trivial as to be arbitrary or unreasonable. (Keen v. Police Board of City of Chicago (1979), 73 Ill. App. 3d 65, 391 N.E.2d 190.) Misconduct which sound public policy would not recognize as good cause for terminating an officer may nonetheless provide good cause for suspension. (Lupo v. Board of Police and Fire Commissioners (1980), 82 Ill. App. 3d 449, 402 N.E.2d 624; Humbles v. Board

of Police and Fire Commissioners (1977), 53 Ill. App. 3d 731, 368 N.E.2d 1049.) The undisputed facts in this case are that for three hours the supervising, senior officer on the shift undertook no contact with dispatchers or subordinates; for almost 90 minutes he could not be contacted by them; and during that time a subordinate apparently needed his assistance. Inasmuch as he was able to transmit, and could easily have determined that radio silence was the result of malfunction, we feel these facts warranted the Board's determination of cause for suspension. We disagree that reversal of the Board's decision to suspend is required because of the absence of regulations specifying the necessity and frequency of contact with Tri-Com and subordinates. While the absence of written regulations is a factor to

consider (Mihalopoulos v. Board of Fire and Police Commissioners (1978), 60 Ill. App. 3d 590, 376 N.E.2d 1105), we feel that Rules 1.5.2.35 and 1.4.7.2 are sufficient to direct the necessity and frequency of a sergeant's contact with subordinates. We agree that a good service record should be considered (Christenson v. Board of Fire and Police Commissioners (1980), 83 Ill. App. 3d 472, 404 N.E.2d 339), but feel that the five day suspension is evidence that it was considered. We find that the facts are sufficient cause to warrant the order of suspension.

The Board contended, alternatively, that the trial judge erred in failing to grant its motion for a change of venue pursuant to Ill. Rev. Stat. 1979, ch. 110, par. 501. Inasmuch as erroneous denial of such a motion renders all sub-

sequent proceedings void (In re Estates of Rice (1979), 77 Ill. App. 3d 641, 396 N.E.2d 298), treatment of this issue is necessary to our decision to reinstate the Board's order rather than remand for a new proceeding in the circuit court. Ill. Rev. Stat. ch. 110, par. 501 (2) permits change of venue "where any party * * * fears that he will not receive a fair trial * * * because * * * the judge is prejudiced against him." Prior to rulings on substantive issues, a proper petition must be granted as a matter of right. (American State Bank v. County of Woodford (1978), 55 Ill. App. 3d 123, 371 N.E.2d 232.) However, if presented after the judge has ruled on substantive issues, the petition must set forth specific allegations of prejudice and will only be granted in the sound discretion of the court. (Libovitiz v.

Cahill (1979), 69 Ill. App. 3d 614, 387 N.E.2d 943; Templeton v. First National Bank of Nashville (1977), 47 Ill. App. 3d 433, 362 N.E.2d 33.) In this case, the defendants' motion was prompted by the trial judge's letter to the parties indicating his anticipated decision, which was sent after he read the record and in his apparently mistaken assumption that the parties did not wish to brief the court or have oral argument. Inasmuch as the judge had previously made substantive rulings on defendant's motion to dismiss, disposition of defendant's motion was committed to his discretion. (Libovitiz v. Cahill (1979), 69 Ill. App. 3d 614, 387 N.E.2d 943; Templeton v. First National Bank of Nashville (1977), 47 Ill. App. 3d 433, 362 N.E.2d 33.) We agree that prejudice is shown where the judge commits himself prior to hearing

evidence and argument of counsel. (Roherty v. Green (1965), 57 Ill. App. 2d 362, 206 N.E.2d 756.) However, defendant's motion stating that the trial judge's decision, in effect, jumped the gun, does not paint a complete picture. This case had been continued several times between March and October, 1979, with no request for hearing. The judge's order indicates he felt the parties did not wish any oral argument or briefing. Particularly since the trial court's consideration was, by law, confined to the record from the Board's hearing (Drezner v. Civil Service Commission (1947), 398 Ill. 219, 75 N.E.2d 303), we feel this was a reasonable assumption. We, therefore, believe prejudice was not shown in these circumstances and that the trial judge acted within his discretion in denying a change of judges and granting,

instead, an extension of time to permit briefing and argument. The order entered after that time was therefore not void and remand is not required.

For the foregoing reasons we reverse the order of the circuit court, and reinstate the order of the Board in full.

REVERSED

REINHARD, LINDBERG, UNVERZAGT

(5)
September Term

Be it remembered that to-wit on the 19th day of October 1981 the same being one of the days of the term of court aforesaid. The following proceedings were by said court had and entered of record, to wit:

WALTER W. MALONE, Petitioner	)	54983
vs.	)	PETITION FOR LEAVE TO APPEAL
COMMISSIONER JOHN F. RICHARDSON, COMMISSIONER JAMES D. KEITH, COMMISSIONER ROBERT G. SCHICK, BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF GENEVA AND SCOTT BRUNDIGE, Respondents	)	FROM THE APPELLATE COURT SECOND DISTRICT 80-254 CIRCUIT COURT 78 MR 6370

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth over rule the prayer of the petition and denies leave to appeal herein.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and Keeper of the Record filed and sealed thereof do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed the Seal of said Court this 12th day of November, 1981.

s/Clell Woods (Seal)
Clerk of the Supreme Court
State of Illinois

Opposition

Office - Supreme Court, U.S.
FILED
FEB 16 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

NO. 81-1355

WALTER W. MALONE, PETITIONER,

V.

COMMISSIONER JOHN F. RICHARDSON, ET AL.

BRIEF IN REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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STATEMENT OF THE CASE

Petitioner seeks review of a decision of the Appellate Court of Illinois, Second District, after denial of a Petition for Leave to Appeal by the Supreme Court of Illinois, wherein the Appellate Court reversed the holding of the Circuit Court of Kane County and upheld the ruling of the Board of Police and Fire Commissioners of the City of Geneva ordering the suspension of one of the City's police officers, Sergeant Walter Malone, for a period of five days.

The Order of Suspension was issued by the Board after full hearing on charges filed by the Geneva Police Chief, which charges consist of five specifications of neglect of duty, with reference to the specific rules and regulations of the Geneva Police Department. (Record C87-88.)

The testimony of twelve witnesses was heard and various exhibits received in evidence throughout the course of the hearing. After considering the evidence, the Board made eight findings of improper conduct on the part of the Petitioner.

Petitioner sought review of that Order in the Circuit Court of Kane County, under the provisions of the Administrative Review Act (Chapter 110, Section 264, et. seq., Illinois Revised Statutes.) The Circuit Court reversed the Board's Order and, on appeal, the Appellate Court of Illinois, Second District, reversed the Circuit Court and upheld the ruling of the Board.

SUMMARY OF ARGUMENT

No showing was made in the Petition for Writ of Certiorari by the Petitioner as to what special or important reason would exist which would warrant consideration of this case by the Supreme Court of the United States. There does not exist any conflict of decisions or any State statute claimed to be unconstitutional and the Petitioner's sole claim is that the facts of the case were determined against him.

Petitioner also did not properly preserve his claim of constitutional violations in the hearings below, and specifically in the proceedings had before the Board of Police and Fire Commissioners. Finally, the Petitioner claims that the actions of the Board in applying the rules of the Geneva Police

Department were, in fact, ex post facto in nature and, therefore, violative of his constitutional rights. It is well settled that ex post facto provisions of Article I of the United States Constitution do not apply to legislation imposing civil penalties.

I.

NO SPECIAL OR IMPORTANT REASON EXISTS WHICH WOULD WARRANT THE GRANT OF A WRIT OF CERTIORARI

Rule 17 (formerly Rule 19) of the Supreme Court Rules outlines the scope of matters which merit consideration by the Supreme Court. Without enumerating them, review will be granted on a Petition for a Writ of Certiorari only when there are special and important reasons therefore. Fay v. Noia, (New York 1963), 83 S.Ct. 822, 372 U.S. 391.

When a conflict exists in the decisions of lower Courts, either on important federal questions, or on a constitutional matter then review is appropriate. Petitioner has demonstrated nothing here which would meet any of these criteria.

Jurisdiction is claimed pursuant to 28 U.S.C. Section 1257(3), but even if

jurisdiction exists, its exercise is discretionary. Dunham v. U.S., (Oregon 1971), 91 S.Ct. 858, 401 U.S. 481.

This case does not present to this Court any conflict of decisions or State statutes claimed by Petitioner to be unconstitutional. Petitioner does not claim that the Board of Police and Fire Commissioners is improperly constituted or that the Board cannot make rules and regulations pursuant to its statutory authority. Petitioner's sole attack here is that the facts of the case were determined against him. These facts were found by the very body charged by the enabling statutes to do so. The findings were then reviewed on administrative review, and then by the Appellate Court of Illinois. That Court appropriately noted that findings of fact will not be overturned if supported by the evidence. The Supreme Court of

Illinois declined to accept the case for further review because no important or significant legal or constitutional questions were presented. For those same reasons, this Court should also decline review.

II.

PETITIONER FAILED TO PRESERVE ANY OF THE CONSTITUTIONAL QUESTIONS WHICH HE RAISES IN HIS PETITION FOR WRIT OF CERTIORARI

A question not properly raised in a state court proceeding is not open for review in a proceeding on a petition for certiorari. Ellis v. Dixon, 349 U.S. 458, 75 S.Ct. 850 (1955). Because the Petitioner failed to raise the constitutional issues asserted in his Petition for Certiorari in the proceedings had before the Board of Police and Fire Commissioners in this action, his Petition for Writ of

Certiorari should be denied. In support of his assertion that these issues were properly preserved, Petitioner refers to pages 18, 65-68, and 70 of the Report of Proceedings before the Board of Police and Fire Commissioners on April 24, 1978. None of these r ferences, however, purport to raise constitutional issues.

At page 18 of the Report of Proceedings, counsel for Petitioner stated:

> Mr. Clancy: "You are aware, counsel, of my one objection that there's been no foundation or showing that he has been charged with any misconduct."

This is the only statement attributable to Petitioner on the cited reference. On its face it might appear that Petitioner was referring to the constitutional issues he now raises. Placed in context, however, this isolated comment does not pertain to

any due process argument raised in Petitioner's Petition before this Court. This particular comment was made in connection with Petitioner's objection to the introduction of evidence pertaining to Petitioner's refusal to submit to a polygraphic examination. Petitioner's refusal to comply with this Order was one of the charges brought against him in the original proceedings. The Board found in favor of the Petitioner on this charge and no appeal was taken. (See Order of the Circuit Court, Petitioner's Appendix xvii-xviii.) Illinois law provides that a law enforcement officer may be compelled to submit to a polygraph analysis by order of his superior officer, and the results of that examination are admissible in disciplinary hearings. Austin v. City of East Moline, 7 Ill.App.3d 537, 288 N.E.2d 113 (1972). Petitioner, in objecting to

the admission of evidence pertaining to his refusal to take the polygraphic examination, and in a prior motion in limine on the same issue, argued that the admissibility of polygraphic evidence was conditioned upon a showing that the subject ordered to take the polygraph test had been charged with misconduct at the time he refused to take the examination. (Report of Proceedings before the Board of Police and Fire Commissioners, April 22, 1978, page 20 and April 24, 1978, page 15-16.) It is clear, therefore, that Petitioner's objection noted on page 16 of the April 24, 1978 Report of Proceedings pertains to the foundation of the admissibility of evidence in support of a charge no longer in issue. This isolated comment can hardly be sufficient to preserve the constitutional issues

Petitioner now raises in his Petition for the Issuance of a Writ of Certiorari.

Likewise, Petitioner's recitation into the record of the litany of reports made to the Chief of Police at pages 65-68 of the Report of Proceedings was merely an offer of proof made to establish the relevance of certain questions asked during cross-examination of the City of Geneva, Chief of Police. This reference does not preserve the constitutional issues raised in Petitioner's Petition for Certiorari.

Petitioner further asserts that the Illinois Appellate Court's consideration of the question of whether or not the Board's findings of facts correspond to facts set forth in the charges brought before the Board, is proof that the constitutional issues were preserved. To the contrary, it is clear that this

portion of the Court's opinion was devoted to the disposition of Petitioner's claim that the Order of the Board impermissibly contained findings of fact which did not directly correspond to items articulated in the charges brought against the Petitioner. The issue addressed by the Court in this regard was simply whether the Board's findings correspond to the notice provisions of the Illinois Civil Service Act, 24 Ill.Rev.Stat. Section 10-2 as reviewed by the Illinois Appellate Court in the case of Kupkowski v. Board of Fire and Police Commissioners, 71 Ill.App.3d 316 (1979). This issue did not raise federal constitutional questions.

As Petitioner has failed to demonstrate that he preserved the constitutional questions before the Board of Police and Fire Commissioners, his Petition for Certiorari must be denied.

III.

THE RULES OF THE GENEVA POLICE DEPARTMENT ARE CIVIL IN NATURE AND ARE NOT VIOLATIVE OF THE CONSTITUTIONAL PROHIBITION AGAINST THE PASSAGE OF EX POST FACTO LAWS, CONSTITUTION OF THE UNITED STATES ARTICLE I, SECTION 9, CLAUSE 3

Petitioner asserts in Section II of his Petition that the rules of the Geneva Police Department are ex post facto in nature and their application to the Petitioner are, therefore, violative of his constitutional rights. The rules, however, which are made part of Petitioner's Petition (Petitioner's Appendix i-v) are simply disciplinary rules governing the operation of the Geneva Police Department and are clearly civil in nature. It is well settled that the ex post facto provisions of Article I of the United States Constitution do not apply to legislation

imposing civil disabilities. Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512 (1952). Accordingly, there can be no conceivable violation of Petitioner's right to be free from ex post facto legislation in this case.

CONCLUSION

Based upon the foregoing arguments and the cases cited in support thereof, the Board of Police and Fire Commissioners for the City of Geneva prays that the Petition for Writ of Certiorari filed by the Petitioner Walter W. Malone be denied.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

STATE OF ILLINOIS)
) SS.
COUNTY OF K A N E)

Donald L. Puckett, being first duly sworn, on oath, says that he is a member of the Bar of the United States Supreme Court, and that the Brief in Reply to the Petition of Writ of Certariori was filed with the Clerk of the Supreme Court of the United States by mailing forty (40) copies of the same to the Clerk, properly addressed, with first class postage prepaid, and three (3) copies of the same were served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to his attorney at their business address as disclosed by the pleadings of record herein, with first class postage fully prepaid and by depositing the said envelopes in a U. S. Post Office Mail Box in Aurora, Illinois before 6:00 p.m. on the 12th day of February, 1982.

Donald L. Puckett

Subscribed and sworn
to before me this 12th
day of February, 1982.

Notary Public